IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

VAUGHN G., et al.	*	
Plaintiffs	*	
v.	*	**CIVIL ACTION NO. MJG-84-1911 (Exempt from ECF)**
MAYOR and CITY COUNCIL OF BALTIMORE, et al.	*	
Defendants	*	

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MEMORANDUM OF DECISION RE: EMERGENCY ORDER

On June 28, 2005 the Court, concerned about the status of special education services provided or, to be more precise, not being provided to the students of the Baltimore City Public School System, ("BCPSS"), issued the Memorandum and Order Re: Summer Remedy For Interruptions in Services, [Paper No. 1510], and the Order Re: Required Briefing, [Paper 1509].

In the briefing Order, [Paper 1509], the Court stated that it would consider whether the Maryland State Department of Education, ("MSDE"), should be authorized to assume broader authority with regard to oversight, management and operation of BCPSS' provision of special education services as well as of all school district departments and operations which vitally affect special education, including Transportation, Human Resources, Finance, and General Instruction. The Court

directed the parties to provide briefs addressing the question of MSDE's oversight, management and/or operation of BCPSS' provision of special education services. The said Order further directed the parties to provide their respective positions regarding, among other things, the systemic remedies each party proposed to address the interruptions and related Court Order compliance issues.

The parties have filed briefs in compliance with the Order and have submitted their respective proposals for the course of action to be followed immediately. The Court has held a hearing, heard evidence from the parties as well as the arguments of counsel as to which of the proposed courses of action to take.

Each of the parties has recognized that there is an emergency in regard to BCPSS' continuing failure to comply with Court Orders given the need to provide required special education related services on an ongoing basis commencing with the imminent start of 2005/06 school year and the avoidance of further massive interruptions of services on an ongoing basis. The parties presented the Court with their respective proposed courses of action to take in light of the August 29th commencement of the school year:

1. **BCPSS proposed that the Court permit it to engage a turn around firm, Alvarez and Marsal LLP, who, together with a special education consultant, would engage in a "diagnostic study" and provide a plan by the end of September.**
2. **Plaintiffs proposed that the Court put the special education related services functions of BCPSS in a receivership with David Gilmore, a consultant who is presently the special education transportation administrator for the D.C. Public Schools pursuant to a District of Columbia Court Order.**

3. **The MSDE proposed the adoption of its Intensive Management and Capacity Improvement Plan, (hereinafter referred to as "the Plan"), calling for its placing MSDE personnel to work along side with, manage, and direct, as necessary, BCPSS personnel in certain areas relating to special education.**

The Court, faced with an emergency situation and the imminent commencement of the school year must decide, on an expedited basis, the course of action to take. The Court finds that it is compelled by the dire circumstances of this case to select a clear choice of action that BCPSS strongly opposes. It is readily apparent that the MSDE proposal, subject to certain modifications, presents the only realistic hope that the special education students in the BCPSS will not, for yet another year, be deprived of what they need and are entitled to receive.

The time exigencies prevent the Court from providing a comprehensive written decision without imposing a delay upon

the issuance of its operative Order. Thus, this decision is issued on an emergency basis due to the imminence of the 2005/06 school year on August 29, 2005 and the devastating likelihood that the massive failure to deliver services and violation of students' legally protected rights will once again re-occur without prompt remedial intervention. Accordingly, the Court may supplement the instant decision if, and when, such supplementation would be appropriate.

I. INTRODUCTION

Over the course of the 2004/05 school year, it became apparent that a collapse in the City's operational capacity to deliver special education services had occurred. The record of this case, including but not limited to evidence presented at a series of hearings conducted since March 23, 2005, reflects a widespread failure to provide basic special education services to students with disabilities as required by the Orders of this Court and the provisions of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq. The record further demonstrates a consistent pattern of the school district's failure to take all reasonable measures necessary to:

(a) prevent and remedy a broad pattern of interruptions in the delivery of special education services that became clearly evident in the end of October 2004 and expanded throughout the school year;

(b) provide individual compensatory services to students to make up for lost special education services as required by the Orders of this Court; and

(c) comply with the requirements of this Court's Orders with respect to interruptions in services.

The record further establishes a severe and persistent problem with fiscal management and efficiency. Indeed, deficiencies in federal and state grant administration and delivery of special education and related services have precluded BCPSS access to significant state and federal funds in times of great need. Moreover, the continuing absence of sound management and practices in these areas has put BCPSS unnecessarily at risk of the loss of millions of dollars of grants and medicaid reimbursements.

All parties to this action agree that the situation is drastic and requires immediate and major systemic intervention that addresses the specific delivery of special education related services as well as the various other school district departments and systems that inter-relate with the provision of special education services.

Under the Individuals with Disabilities Education Act ("IDEA"), the MSDE is legally charged with the ultimate

authority and responsibility for insuring that a free appropriate public education is available to all disabled children between ages 3 and 21 residing in the State. See 20 U.S.C. § 1412, 1413; 34 C.F.R. § 300.600; and 34 C.F.R. § 300.360(a)(2). See also Morgan v. Greenbrier County West Virginia Bd. of Educ., 83 Fed. Appx. 566, 568-69 (4th Cir. 2003); Gadsby v. Grasmick, 109 F.3d 940 (4th Cir. 1997); and Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 697 (3d Cir. 1981).

As discussed herein, the Court concludes that the MSDE Plan, subject to certain modifications shall be adopted.

II. DISCUSSION

The problem of interruptions in the delivery of special education instructional and related services to students has lain at the core of this case since its inception. A failure to deliver instructional or related services required by students' Individual Education Programs ("IEPs") results in the denial of students' rights under IDEA to a Free and Appropriate Public Education.[1] See 20 U.S.C. § 1412(a)(1)(A).

[1] The parties have agreed for purposes of this case on the scope of interruption in services (the number of days when services or instruction were not provided) that will give rise to an automatic student entitlement to compensatory services. See Fact Sheet on Calculation of Compensatory Awards, last

Tracking and reporting of the delivery of services and interruptions have therefore constituted fundamental requirements of the Consent Orders' entered in this case.[2] See, e.g., Consent Order of November 4, 1992 at ¶¶ 15 and 50; 1998 Consent Order Regarding Compensatory Awards at ¶ 33 [Paper No. 1079]; and Ultimate Measurable Outcome 11 established by Consent Order of May 4, 2000 [Paper No. 950], (requiring Defendants' substantial compliance with the requirement that "No more than 2% of students with disabilities will have interruptions in service in any school year . . .").

The Court's Order of December 17, 2004, [Paper No. 1460], catalogued the serious programmatic and fiscal deficiencies evident in the 2003/04 school year that impeded BCPSS' delivery of special education services to students with disabilities and its disengagement from the Court's jurisdiction under the Ultimate Measurable Outcomes Consent

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approved by the Court in its Memorandum and Order of June 26, 2001 denying Defendants' Motion to Modify the 1998 Consent Order Regarding Compensatory Awards, [Paper 1079].

[2] Indeed, the school district had paid hundreds of thousands of dollars in fines over the years to the Court for interruptions in violations before this fine provision was eliminated in 2003 due to the parties' entry into a Stipulation and Consent Order Regarding Modification of the 1998 Consent Order Regarding Compensatory Awards, [Paper 1274].

Order. The Court identified the variety of conditions, including the malfunctioning within "ancillary functions" such as human resources, regular education, and fiscal operations, that increased the probability of significant disruptions in the provision of required instructional and related services in the 2004/05 school year to students with disabilities and directed the Special Master to report on certain discrete conditions.

The Court's concerns unfortunately proved to be well warranted. On February 2, 2005, BCPSS reported several hundred students with interruptions in services. Many of these violations dated back to October and November 2004. Testimony in subsequent status hearings indicated that BCPSS' central office officials first became aware of the burgeoning number of students who had not received speech and language services sometime between October and December 2004. Dr. Bonnie Copeland, the Chief Executive Officer, however, testified at the Court's March 23, 2005 hearing that she only learned of the broad scope of interruptions within the prior month. She stated at that time that communication deficiencies within the school district organization appeared to be the chief cause of the breakdown in service delivery and that this problem was being rectified. Other BCPSS officials

represented that strategies were in place or were being developed to ensure that individual students now received their IEP services as well as timely remedial services to compensate for those previously not furnished.

BCPSS' February 2, 2005 report of the number of students affected by interruptions, as well as its later reports to the Court at hearings regarding the scope of service interruptions grossly under-stated both the huge proportion of students affected by service interruptions and the number of service hours lost. In fact, both the Special Master and the MSDE subsequently found that the majority of students with disabilities within the school district had experienced interruptions in the provision of required IEP services.[3] As indicated in the Consent Order on Contempt RE: Interruptions

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[3] **The proceedings to date have largely focused on the high rate (between 54.2% and 83%, depending on the audit) of "interruptions" in the provision of related special education services, as defined by 20 U.S.C. § 1401(26)(A), but excluding transportation services. The Special Master found that 66.9% of students in the audit sample experienced an interruption in one or more related services and/or in the delivery of special education instruction. See the Special Master's Report on Interruptions in Services Audit dated June 15, 2005 [Paper No. 1498]. Her Audit Report found a 33% rate of interruptions in the provision of special education instruction to students. BCPSS filed no objections to these findings. Due to inadequacies in the Transportation Department's data base and documentation, the only audit of transportation services partially completed to date tracked the rate of interruptions in transportation services during students' first week of school or the commencement of their IEP.**

in Services, the BCPSS has agreed that the related services interruption rate was at least 54.2%, as found by the Special Master. [Paper No. 1537]. The MSDE's audit showed that this pattern was pervasive across the district's schools and related services. BCPSS also conducted a supplemental review of students referred for compensatory service during the 2004/05 school year in conformity withe the Court's Order of June 29, 2004 [Paper No. 1510] and the parties' agreements. Disturbingly, this review indicated that many students had experienced significant supplemental hours of related service interruption in the months after BCPSS had first identified their interruption in services during the 2004/05 school year. See BCPSS Second Summer Remedy Report, [Paper 1536].

In partial response to the breakdown in IEP service delivery, the Court held hearings and issued further Orders in March, April, and June 2005 to establish clear parameters for the timely identification of affected students, provision of remedial services, and the development of appropriate systemic remedies. The Court also repeatedly warned BCPSS' officials of the gravity of issues posed by their failure to address interruptions in services and the underlying causes of such failures. See, Orders of March 31, 2005 [Papers 1482 & 1483]; Order of April 27, 2005 [Paper 1485]; and Order of June 28,

2005 [Paper 1510]. Indeed, the Court its Order of March 31, 2005 [Paper No. 1483] expressly directed that a representative number of members of the BCPSS' Board of Commissioners and the BCPSS' CEO attend a hearing with the Court in April to ensure that the school district's leadership fully understood and addressed the magnitude of the crisis facing the school district and the need for action "to salvage the educational opportunities available to BCPSS children for the 2004/05 school year." See Paper 1483 at 6.

The Court established requirements for BCPSS' complete identification of students affected by interruptions and initiation of remedial services as well as for the development of future systemic preventive actions. See, e.g., Court Orders of March 31, 2005 [Paper No. 1483] and April 27, 2005 [Paper 1485]. However, by the end of the school year, the school system was scrambling to assemble a process for identifying affected students and providing remedial services over the summer. See Court Order of June 28, 2005 [Paper 1510]. The evidence at the hearing of June 17, 2005 made clear that BCPSS had not taken all reasonable measures to fulfill their obligations under these Orders. However, school district officials represented that they had sufficient contracts with related service providers to provide services

to up to 5,000 students over the summer.[4] The Court once again issued directives to ensure that BCPSS would devote all necessary resources both to the provision of make-up services to affected students and the prompt identification of the related service hours lost by affected students. Court Order of June 28, 2005 [Paper No. 1510].

Despite the Court's directives and despite the representations of BCPSS' officials, as of the August 10, 2005 hearing, less than 300 students had received completed make-up remedial services. In fact, BCPSS had projected that 1000 or less parents would respond to notices concerning the availability of summer remedial compensatory services. The school district did not have providers to assign to the 2,000 or more students whose parents responded affirmatively to notices.[5] Remedial services had been provided for only seven percent of the related services due the group of 694 students

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[4] Approximately 10,000 to 11,000 students with disabilities within BCPSS receive related services.

[5] See, the Consent Order on Contempt RE: Interruptions in Services [Paper No. 1537]. Because BCPSS's final report on the summer remedy is not due, the Court did not attempt to conclude hearings on the delivery of the summer remedy. However, as BCPSS admits, the school district did not comply with terms of the June 17, 2005 Order. MSDE's affidavit evidence (MSDE Reply Brief of August 1, 2005, Exhibit 1) strongly suggests that the summer remedy program was run in a chaotic matter.

first identified with related service violations between the July 1, 2004 and June 30, 2005.[6] See generally, Consent Order on Contempt RE: Interruptions in Services [Paper No. 1537].

In sum, the evidence demonstrates the school district's repeated failure to implement effective remedial measures to address interruptions in services and repeated empty avowals that remedies would be promptly and fully implemented. The Court recognizes that there are many BCPSS employees who have diligently worked with commitment to children within BCPSS. The school system's band-aid approach and denial of broad systemic responsibility until the commencement of hearings on August 8, 2005 only served sadly to undercut these employees' efforts.

III. THE PARTIES' PROPOSALS

As noted in the Introduction hereto, the Court's June 28, 2005 Order re Briefing [Paper No. 1509] directed the parties to address in briefs their respective systemic remedial proposals. The parties were also asked to address State

[6] While BCPSS may succeed in providing more services to students in the last few weeks in August before school starts, the overall remedial picture described here will not change significantly. BCPSS representatives stated at the August 10, 2005 hearing that the new sites they opened on August 8, 2005 to provide services to students can serve a maximum total of 200 students.

Superintendent Grasmick's request that MSDE assume a broader, more aggressive role in supervision and management of the array of functions and departments that impact the delivery of instructional and related services to students with disabilities. Court Order of June 28, 2005 [Paper No. 1509]. Hundreds of pages of briefs and exhibits were submitted to the Court.

In its briefs, BCPSS argued that it had made internal organizational changes that would address the asserted aberrational issues faced in the 2004/05 school year. BCPSS further argued that MSDE had hampered its reform efforts by allegedly (a) failing to provide the technical assistance and resources that BCPSS required to operate; and (b) imposing redundant and oppressive reporting and plan requirements.

On August 8, 2005, the first day of hearings on the parties' proposals, BCPSS submitted an entirely new proposal that had been developed within few days of the hearing. This proposal called for the school board's hiring of a company specializing in corporate turn-arounds working with a special education consultant. The scope of services or deliverables for this team had not yet been resolved. As represented at the hearing, the BCPSS proposed that this new "team" would prepare a diagnostic assessment of BCPSS' systems and problems

relative to special education service delivery and would be charged with developing a systemic plan of action by September 30, 2005, one month after the August 29, 2005 opening date of school. The turn-around company's management representative had been contacted only days before the hearing regarding this possible new business initiative. The education consultant had performed services for BCPSS and had provided recommendations regarding the district's progress in meeting the Court's disengagement Outcomes. The recommendations were not disclosed, however, by virtue of a privilege claim.

Plaintiffs proposed the appointment of David Gilmore as a related services receiver or court appointed administrator. Mr. Gilmore is a Court appointed administrator of special education transportation related services in the District of Columbia[7], who specializes in handling troubled public agencies. Mr. Gilmore was not knowledgeable about the specific issues in Baltimore but instead focused on the approach he has found successful in re-directing and focusing the work of public agencies to ensure service delivery to their public clientele.

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[7] **Nikita Petties, et al. v. The District of Columbia, et al, Civil Action No. 95-0148 (PLF) (Consent Order Appointing Transportation Administrator, June 25, 2003)**

MSDE submitted a detailed systemic remedy plan with its first brief on July 18, 2005.

A. <u>The BCPSS Proposal</u>

The school district's proposal that a "turn-around" company's present a remedial plan on or about September 30, 2005, a month after the commencement of school, well illustrates the inability of the Court to rely upon BCPSS until such time as there is drastic improvement in its operational ability. It is surprising (to say the least) that BCPSS, faced with the need to provide this Court with a proposal that would result in compliance with special education obligations by the beginning of the school year, did not develop its complete "plan" until afer briefing had been completed. Indeed, it appears that the "plan" - such as it is - was cobbled together a few days before the Monday, August 8th hearing on the parties' respective proposals. Moreover the testimony of the BCPSS' CEO that she had a "handshake contract" with the consulting firm in the context of the most preliminary of exploratory discussions provides little confidence in the BCPSS fiscal management practices. This Court can take judicial notice that the firm of Alvarez and Marsal LLP has a fine reputation as "turn around"

specialists and makes no adverse finding as to their qualifications. Nevertheless, it is hardly appropriate for the BCPSS' CEO to agree - even by handshake - to retain the firm for a million dollar plus engagement without, at a minimum, having a clear proposal to base its financial commitment upon. While the firm provided self-serving testimony as to how successful it was, it appears that there is in fact considerable controversy in St. Louis regarding their merits[8].

Of course, it may be that the critics of Alvarez and Martelk are in the minority and simply wrong. Nevertheless, even assuming that duly diligent investigation would ascertain that the firm did a wondrous job in Saint Louis and could do the same in Baltimore, the proposal by BCPSS is most unsound. First of all, BCPSS would not give Alvarez and Marsal the authority given in Saint Louis to effect changes and, thus,

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[8] See, e.g., STLTODAY.com (June 6, 2005), http://www.stltoday.com/stltoday/news/columnists.nsf/billmcclellan/story/48205E0AF51BE60E862570180043143E?OpenDocument (providing a casual review of St. Louis news coverage of Alvarez and Marsal's thirteen month management of the St. Louis schools indicates, as often might be expected, that intense controversy accompanied an outside private "turn around" firm's management of a public school system. The controversy was so significant that some in St. Louis have suggested that the firm motto might be that "there is no situation so bad that we cannot make it worse.")

the responsibility for the success or failure of their efforts. Second, and even more serious, is that the engagement - such as it is - is to develop a plan of action by the end of September, a month after the commencement of the School year. It would only be then that BCPSS would decide what it actually proposed to do and the Court could begin to evaluate the efficacy of the plan.

B. Plaintiffs' Proposal

The Plaintiffs' proposal has merit in the sense that Mr. Gilmore and his team appear to have successfully performed in an analogous role in the District of Columbia although also inevitably provoking their share of controversy. Indeed, Mr. Gilmore is particularly impressive in regard to the specific function of improving an urban school system in regard to a critical aspect of the providing of special education related services. Nevertheless, the Court concludes that the MSDE proposal rather than the Plaintiffs' should be accepted although there may well be a role for Mr. Gilmore to play in light of his experience

C. MSDE Proposal

The MSDE proposed the adoption of its Intensive Management and Capacity Improvement Plan, calling for its placing MSDE personnel to manage and direct BCPSS personnel in certain areas relating to special education. The Court's adoption of the Plan would be, in essence, a transfer of authority from BCPSS management to MSDE within the scope of the Order. However, of the proposals before the Court, the Plan provides the only realistic chance that BCPSS can meet, or even approach meeting, is special education obligations.

The Court notes that by virtue of past mismanagement, the Baltimore City School System is not now a traditional locally controlled entity. The Board is selected jointly by the Governor and the Mayor so that ultimate control already is somewhat shared by the State and the City.

In any event, the Court finds that the Plan provides the least intrusive proposed systemic remedy likely to effect compliance and squarely builds on the supervisory role provided MSDE under federal and state education law. The Court will not, however, completely adopt the Plan as written.

There may well be a need for modification, particularly in regard to careful tailoring of the Plan to minimize the transfer of control to that necessary to carry out the

objectives of bringing the special education function of BCPSS into compliance with Court Orders, achieving the outstanding Ultimate Measurable Outcomes[9], enabling the disengagement of BCPSS MSDE under this Order and facilitating the successful termination of the instant litigation.

Accordingly, recognizing the emergent circumstances now faced by virtue of the imminence of the beginning of the School Year, the Court will Order forthwith implementation of the Plan subject to conditions including the requirement that initial priority shall be given, on an emergency basis, to the delivery of special education services on a current basis commencing the beginning of the 2005 - 06 School Year (and continuing thereafter) and the cessation of interruptions in services. The Court will, expeditiously consider modifications to the Plan so as to narrowly tailor the extent of reduction of control by the BCPSS Board to that necessary to achieve compliance with Court Orders and related federal law pertaining to special education.

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[9] **See, Consent Order of May 4, 2000, [Paper 950] and Stipulation and Consent Order Regarding Ultimate Measurable Outcomes (July 28, 2003) [Paper 1287].**

IV. REMEDIAL ANALYSIS

The Court has broad powers to issue remedial measures design to effect compliance with its Orders. Thompson v. U.S. Department of Housing and Urban Development, 404 F.3d 821, 830 (4th Cir. 2005).

Outside receivership is considered a "last resort" as an equitable remedy, one that should only be taken when all other remedial measures have been exhausted. Courts review the appropriateness of the receivership remedy based upon five factors: (1) whether there were repeated failures to comply with its orders; (2) whether continued insistence on compliance would lead only to confrontation and delay; (3) whether there is a lack of sufficient leadership to cause change in a reasonable time; (4) whether there was bad faith; (5) whether resources are being wasted. Dixon v. Barry, 967 F. Supp. 535, 550 (D.D.C. 1997). See also, Morgan v. McDonough, 540 F.2d 527, 533 (1st. Cir. 1976); The Judge Rotenberg Educational Center v. The Commissioner for the Department of Mental Retardation, 424 Mass. 430, 677 N.E.2d 127 (1997).

The record in this case satisfies all five receivership factors. The Court has utilized all remedial options, including the draconian sanction of fines. It has given the

school district time and opportunity to address the crisis at hand even when it was in contempt of the Court's Orders. The Court has taken all reasonable measures to ensure that the school district's leadership was fully informed so that it would be equipped independently to address this crisis many months before the start of school. Precious time and resources have been wasted as the months have rolled by, and the volume of students experiencing interruptions in services has soared. In sum, the Court has carefully observed the Supreme Court's admonition that "[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." Milliken v. Bradley, 433 U.S. 267, 280- 281, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745 (1977).

Although the Court would be authorized to impose an outside receivership based upon these circumstances, it finds that MSDE' Plan, as modified by the Court's Order of this date, entails a far less intrusive, tailored remedy that is fully consistent with MSDE's established statutory authority and relationship to local Maryland school districts. MSDE has the legal authority, resources, and duty to assume ultimate responsibility at this late juncture for the crisis and

collapse in special education services at hand. And as a Defendant in this case, MSDE will be held responsible by the Court for meeting the legal obligations imposed by this Court's Orders and IDEA's directly related specific mandates.

Further delay by the Court in effecting concrete action, little more than two weeks before the opening of school, to await the BCPSS development of yet another plan with yet another new team, would serve only to deprive special education students of yet another year of services to which they are entitled. The Court would be enabling BCPSS management to persist, for yet another year, in chaotic, unreliable, and wasteful "remedial" exercises at the expense - in the precious coinage of educational opportunities - of the most at-risk children in the Baltimore City Public Schools.

The children of Baltimore City, especially those most at risk, the ones presenting special education needs, deserve far more than they have received from those who run their public school system. The Court finds that it must act, and act immediately, to permit the Maryland State Department of Education to enable the many fine BCPSS employees who have been ready and willing and able to do their job to do so in a well managed school system. The school children of Baltimore

City, and those in the school system who are worthy of the title "educator," deserve no less.

V. CONCLUSION

For the foregoing reasons:

1. **The Motion to Implement the MSDE Plan is GRANTED SUBJECT TO CONDITIONS.**

2. **A separate Order shall be issued herewith.**

SO ORDERED this 12TH day of August, 2005.

/S/
Marvin J. Garbis
United States District Judge